

## TITLE 329 SOLID WASTE MANAGEMENT BOARD

### SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On July 15, 2008, the Solid Waste Management Board (board) conducted the first public hearing/meeting concerning additional protections for ground water by under-dispenser spill containment of underground storage tanks and the secondary containment of any new or replaced underground storage tanks. Comments were made at the first hearing/meeting by the following:

John Austin, Modern Welding Company	(MW)
John Childs, Mid-Valley Supply	(MVS)
Bill Greer, Indiana Petroleum and Environmental Contractor's Association	(IPECA)
Michael Schutz, August Mack Environmental	(AGM)
Keith Welch, K & W Fueling Systems	(K&W)
Harry Beals, Williams, Beck, and Hess	(WB&H)
Pat Kennedy, Kennedy Tank and Manufacturing Company	(KTM)
Angela Dorrell, Indiana Petroleum Marketers and Convenience Store Association	(PSRB)

Following is a summary of the comments received and IDEM's responses thereto:

*Comment:* Modern Welding and our fellow subsidiaries that manufacture and ship tanks for underground installation in Indiana would like to express our support for this proposed requirement. Double walled tanks do not double the cost of a tank; double walled tanks are 15-20% higher in price. Ground water protection is best accomplished with double walled tanks. There is a limit to the insurance products available to us. (MW)

*Response:* IDEM agrees.

*Comment:* We support secondary containment because financial assurance does not stop leaks and I believe double-walled tanks and double-walled piping systems go to a great extent to do that. In their very nature, you're monitoring that interstitial space and as soon as you get liquid in that space, your monitoring tells you that inner tank is leaking, whereas financial responsibility addresses a disaster after it's happened and then tries to figure out who's to blame. (MVS)

*Response:* IDEM agrees.

*Comment:* We are here to support the proposed rule. Installing secondary containment tanks helps prevent leaks; financial responsibility only insures that someone will be able to pay for a leak after it occurs. Requiring the installers to have additional insurance coverage is not going to provide any additional incentive for them other than to cause them to increase their prices in order to cover unforeseen future litigation expenses. Several contractors have stated that if financial responsibility were adopted that they would only sell and install double-walled tanks anyway. Cost to the tank owner would increase because of the fear of litigation. Can 48 States be wrong? There is concern that

the Excess Liability Trust would not be used to pay for leaks but installers would be charged first. Iowa has actually hired a third-party subrogator to go after installers before they have to look at using the state trust fund. Some smaller installers will go out of business in states that adopt the financial responsibility option. Less installers will equate to higher prices and also availability for installations. EPA requires that states that go with financial responsibility be able to monitor and follow the acquisition of this insurance by certified installers. Is the Indiana State Fire Marshal's Office manned adequately to undertake this monitoring of equipment? (IPECA)

*Response:* It is the department's position that the additional cost to purchase and install a tank with secondary containment is far out-weighted by the cost of remediating a leak from a single-walled tank and is therefore not pursuing the financial responsibility option.

*Comment:* I am here, along with Bill and the other members of IPECA, should it be necessary to add some perspective on the cost and impact and disruption of remediation, and since this conversation hasn't really gone that direction, I don't think it is necessary for me to comment. (AGM)

*Response:* Thank you.

*Comment:* The impacts of remediation if a release were to occur, and the high expense of remediation, investigating the extent of the problem and cleaning up the problem, which can be anywhere from a 100 to 300 or 400 thousand dollars or more, especially if ground water's impacted, but also many disruptions to the operation of the facility because of the equipment things necessary to get the job done. Many of these cleanups take several years with remediation equipment that have power requirements and emissions to the atmosphere, discharges of wastewater or treated wastewater, so there's many impacts associated with remediation that can be avoided through secondary containment. (AGM)

*Response:* It is the department's position that the additional cost to purchase and install a tank with secondary containment is far out-weighted by the cost of remediating a leak from a single-walled tank and is therefore not pursuing the financial responsibility option.

*Comment:* We support secondary containment. I think money does play a roll in just about every element of our economy at this time. We have to protect the environment, we have to protect our ground water, and the only way to do that successfully is through secondary containment. There are monitors out there, sensors and everything, that will detect down to .1 whatever you call of a gallon every hour, so those things are out there in place to protect our environment. As far as price, if that's what the real cause for deciding between the two is, installation is a minimal change, if any at all. A tank is a tank, with a double-walled containment, you're only looking at a couple inches longer, a couple inches more in diameter. A hole's a hole, and there's not going to be much difference in the installation cost, and that includes your backfill material, your concrete. Everything's really going to stay the same. If we go to financial responsibility, and with talks with our insurance company, there's really nothing out there for the owner of the company or whatever it may be except to buy a trailer. Say in

2018 we have a leak from 2008. He's been out of business for five years. He would have to have a trailer that follows him just to protect and that cost will be passed on. One thing we've looked at is insuring each separate site with a policy for that 10- year period. There is no 10-year period out there; you have to renew it every year. We installed 49 tanks in 2006. In 2007 we installed 48 tanks. That's a lot of tanks. That cost will be passed on. Basically, 99.9 percent of what we're putting in now is double-walled. I don't think we've put in a single -walled tank in probably 5 years. The cost is no different. Your minimal cost that he was talking about was in pieces and parts due to the monitoring systems, but it's minimal when you consider our environment. (K&W)

*Response:* Thank you for the information.

*Comment:* Williams, Beck, and Hess is a petroleum service contractor in business for 56 years. Common sense tells me that secondary containment is the solution. With secondary containment, you have a monitored containment between the primary storage and soil/water contamination. Financial responsibility addresses the aftermath. It's been said and statistics have shown that single-walled tanks haven't been a major issue in releases in Indiana. Well, after 31 years of cleaning and inspecting underground tanks, I can tell you that there's a lot of leaking, has been and still are in single-walled tanks. It doesn't mean that they're releasing petroleum to the environment; they're taking water on. The nature of the soils in Indiana are clay based, and you dig an excavation to put a single-walled tank in or a tank in, and you backfill it with a noncorrosive material that will hold water, you create the bathtub effect, so the tank corrodes and finally starts leaking, normally it taking water on and not releasing hydrocarbons. I still don't see this as an acceptable solution. So single-walled tanks haven't been a real issue in releases that true, but there's a reason why and I don't think the reason why is acceptable either. (WB&H)

*Response:* The department appreciates the information regarding tanks and the input on this rulemaking.

*Comment:* The other point I wanted to make, cost-wise, from our history, from our past, if you have a hundred-thousand dollar, single walled tank system installation, it costs less than 10 thousand to make it a double-walled system. We have taken the stand to only put in double-walled systems for the last 5 years and I can guarantee you my policies are not going to change. We won't put in a single-walled system, financial responsibility or not, because of that potential liability, and because with double-walled systems, you've got monitoring that now is telling the operator that "Hey, there's something wrong. Let's find it before we have a release." (WB&H)

*Response:* Thank you.

*Comment:* I'm here to support secondary containment as well. In our minds, secondary containment is the better direction versus financial responsibility, much better environmentally, and pretty much a negligible cost increase while looking at the total project cost on an entire installation. I know the cost increase is relative number, but it's definitely much better from a risk-management standpoint as well, and as far as a cost difference, it can be as low as a 20-percent difference from a single-walled technology to a double walled technology. (KTM)

*Response:* This is consistent with information from other commentors.

*Comment:* The insurance requirements for financial responsibility are a concern of ours. Typically the pollution insurance, the environmental impairment liability insurance, is written on a claims-made basis, not an occurrence basis. If a tank manufacturer or an installer, for whatever reason, would decide to get out of the business or close his business, there is not an insurance product available to cover the remaining 30 years for manufacturing or 10 years for the installers. Currently, under that type of scenario, you might be able to get a two-to-three year nose for a significant amount of money, but nothing like 10 or 30 years. The 30-year time commitment for tank and piping manufacturers and the 10 years for installers could definitely cause prominent manufacturers and installers to stop performing business in states that adopt financial responsibility. Under the financial responsibility, manufacturers and installers would be required to have far more extensive coverage than the tank owners or the operators, who are liable for the cleanup and ultimately responsible for maintaining the tank systems. This makes no sense to us. If financial responsibility were adopted, we believe that manufacturers and installers would be drug into a tremendous amount of litigation. Most problems or leaks are not black-and-white scenarios. You've got your manufacturers, you've got your installers, you've got subcontractors who work for the primary installer, you've got your maintenance contractors, as well as you've got generally the owner/operator who has staff that do some maintenance on the tank as well. So, there are a lot of hands in the pot. Many times the problems result from an accumulation of errors or negligent work by different parties. We believe under the financial responsibility requirement, the manufacturers and installers would be the primary targets of the plaintiffs in future disputes. I've been on the Board of the Steel Tank Insurance Company for the past 18 years. We set up a captive insurance company back in 1988, as a result of the fact that the tank manufacturers in the country could not obtain pollution insurance. As a member of that Board, we review claims history very closely. The State of Indiana has been very fortunate to date as far as relatively few claims, but nationwide, claim activity has been much higher than we've seen here in this state. The litigation that goes on in these types of cases is very onerous for everyone concerned. Again we support secondary containment.  
(KTM)

*Response:* IDEM agrees with the concerns expressed in this comment.

*Comment:* The IPCA urges the Board to require the reconsideration of the financial responsibility option in lieu of the more costly secondary containment. Indiana's small-to-medium-sized petroleum marketers support the option of financial responsibility for 6 main reasons. First, the regulated community and IDEM would agree with the results of leak autopsy studies that have been performed around the country which demonstrated that the principle source of UST system releases is piping, not the tanks, and in 2007, the IPCA worked with General Assembly members to enact a law requiring secondary containment of piping to address that very issue. (PSRB)

*Response:* IDEM agrees that piping is often the sources of leaks but it is not the sole source. IDEM also supports the statutory change mentioned by the commentor.

*Comment:* Second, secondary containment poses a significant financial burden on small-to medium-sized petroleum outfits that are already struggling to survive in an uncertain economic climate, and our position is that the fiscal impact analysis does not accurately reflect the actual costs that will be imposed upon small-to medium-sized petroleum marketers. We believe that for a monitored double-walled tank, the cost can be as much as double a single-walled tank. The cost of secondarily contained piping and monitoring systems can be as much as three times the cost of single-walled piping. (PSRB)

*Response:* Other commentors involved with the installation of tank systems have indicated that the cost is not as significant as portrayed in this comment.

*Comment:* Third, financial responsibility has successfully been implemented in other states that adopted the financial responsibility option and they have not experienced many of the problems that you've heard voiced here today. Manufacturers and installers are readily available; there's not been any increase in litigation. Concerns that there would be an increase in litigation as a result of the adoption of financial responsibility is really uninformed, as currently, those manufacturers and installers in Indiana are responsible and can be held legally liable today for a faulty tank that's been improperly manufactured or installed. Financial responsibility does not affect that. (PSRB)

*Response:* Only two other states have adopted a form of financial responsibility and it has not been in effect long enough to judge impacts on litigation levels. Contact with those states have revealed they are encountering problems with finding insurance policies that will cover a 10 year or 30 year timeframe.

*Comment:* Fourth, financial responsibility is consistent with existing management practices of reputable companies who already maintain general liability policies to cover those actual emissions that occur. The typical type of policy that's issued to cover this work is occurrence based, meaning 30 years from now, if there's a release and it's attributed to a manufacturer or installation, and we look to the policy that was in place at the time the occurrence occurred, even if that manufacturer or installer no longer carries that particular policy. (PSRB)

*Response:* While Indiana has been identified as a state where such claims against past policies have been successful that is not necessarily a good indicator of how future policies may be enforced.

*Comment:* Fifth, financial responsibility is consistent with Indiana's financial responsibility or assurance program under the Excess Liability Trust Fund (ELTF) for addressing liabilities arising from leaking underground storage tanks. (PSRB)

*Response:* IDEM believes that requiring secondary containment of tanks will reduce the number of future claims against the ELTF and further promote its stability.

*Comment:* Lastly, financial responsibility is consistent with Indiana's initiative to support the state's alternative energy program for E-85 fuels. The increased cost imposed by secondary containment will preclude small-to medium-sized petroleum marketers from investing in alternative fuel technology. The IPCA's position is that IDEM should perform a cost-benefit analysis and should reconsider financial

responsibility as an alternative to the more costly secondary containment option. (PSRB)

*Response:* The department has performed a fiscal impact on this rulemaking and has not found the rule to be burdensome to owners and operators of petroleum marketers in general.